NO. 91-501

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

JOSE E. APONTE, Et Als.,
Petitioners,
V.
NORMA IRIS HIRALDO CANCEL, Et Als.,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

BRIEF FOR RESPONDENTS OPPOSITION

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QUESTIONS PRESENTED

Certiorari should not be issued in this case to consider the following questions:

1. WHETHER, after conflicting evidence at trial submitted to the jury concerning a case arising under 42 U.S.C. 1983 in which plaintiff alleges and prove their dismissal from public employment were motivated by their political affiliation and defendant deny such allegation and in addition defendant try to proof that there were valid reasons to terminate plaintiffs from their employments, the District and appellate Court applied correctly the rule of causation of Mount Healthy City School District Board of Education V. DOYLE 429 U.S. 274 (1977)

2. WHETHER the District Court correctly instructed the jury concerning the rule of causation found in the case of Mount Healthy, supra, where there is conflicting evidence as to the real reason defendants had in terminating plaintiff from their employment.

LIST OF PARTIES

The parties to the proceeding below were the petitioners, the Municipality of Carolina of the Commonwealth of Puerto Rico, and Jose E. Aponte, Mayor of the Municipality of Carolina, and respondents, Norma Iris Hiraldo-Cancel, Gladys Hiraldo-Cancel, Yolanda Allende-Lind, Aura Gonzalez, Everydith Conde, Carmen Marquez, Judith Monzon, Luis Felipe Rodriguez and Fermin Marengo-Rios.

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OPINION BELOW

The judgment of the Court of Appeals on Appendix A; pages A1-A8, of petitioners' petition and an ORDER OF COURT of the appellate court dated May 13, 1991 denying petition for rehearing and suggestion for rehearing in banc appears on petitioners' APPENDIX B, page A-9.

The OPINION of the First Circuit of February 4, 1991 is reported at 925 F. 2d 10 (1991).

JURISDICTION OF THE COURT

Petitioners filed their petition for writ of certiorari pursuant to 28 U.S.C. 1254 (1).

PROVISIONS OF LAW INVOLVED

AMENDMENT I

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV

"Section 1. All persons born of naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States of other person within the jurisdiction thereof to

the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1332 of Title 3 of Laws of P.R. Annotated (L.P.R.A.) which is a section of the **Public Service Personnel Act** read as follows:

> **Section 1332 (5)**: The office in the case of the Central Administration and each appointing authority in the case of Individual Administrators, shall establish separate classification plans for career and confidential services. Classes shall be grouped on the basis of an occupational or professional scheme, which shall be integrated part of the classification plan.
>
> **Section 1332 (8)**: When circumstances justify it, the duties, authority and responsibilities of a position may be changed according to the criteria and mechanisms established by regulations, without necessarily requiring the reclassification of the position. In these cases, the new duties, authority and responsibilities must be related to the classification of the position affected there by.

Section 1333 which title is RECRUITMENT and SELECTION is quoted in Appendix G of petitioners, pages A-22-24.

Section 1333 (11) of Title 3 L.P.R.A. establish as follows:

"(11) special procedures for recruitment and selec-

tion may be established by regulations in the following cases:

(a) When there is no appropriate list eligible available for certain classes of positions and the urgency of the service to be rendered justifies it"

Section 1333 (15) reads:
"The Director in the Case of the Central Administration and each appointing authority in the case of Individual Administrators, may authorize selective certifications when the special qualifications of the positions require it, or the applicants have expressed their preference, in writing to work in a specific town or agency".

P.R. Laws Ann. tit. 3 § 1337

§ 1337. PROHIBITION

"For the purpose of guaranteeing the faithful application of the merit principle in public service during the period before and after elections, the authorities shall abstain from making any movement of personnel involving areas essential to the merit principle, such as appointments, promotions, demotions, transfers and changes in the category of the employees.

This prohibition shall comprise the period of two months before and two months after General Elections are held in Puerto Rico. In the case of municipalities, it shall be understood that the prohibition extends until the second Monday of January after

said General Elections.

Exceptions may be made to this prohibition for urgent needs of the service, upon approval by the Director, pursuant to the standards established by the regulations."

TABLE OF AUTHORITIES

Cases:

APPENDIX - I

"Construction of this section as applicable to University **would lead to illogical results, from practical standpoint, among them, paralyzation of activity** - such as education - which should be a continuous process." 1980 Opinion Secretary of Justice of Puerto Rico. No. 30. (1980 Op. Sec of Jus. 30)

APPENDIX - II

IN THE SUPREME COURT OF PUERTO RICO

CARMEN D. FRANCO	*	
PLAINTIFF-APPELLANT	*	
V.	*	NO. R-82-49
MUNICIPALITY OF CIDRA, ET AL	*	
DEFENDANT-APPELLEES	*	

On July 1, 1977, the then mayor of Cidra, Tomás Rodríguez Ruíz, appointed Carmen D. Franco, directly and without competition, to the position of Personnel Director of the Municipality of Cidra. She was put on probation and received a monthly salary of $500. After six (6) months of satisfactory work she was given a permanent appointment on January 1, 1978.

That being the case, on January 13, 1981, the new mayor Luis A. Santos Flores, removed her from office without preferment of charges or a hearing, on the grounds that she was confidential employee who advised him "in all matters concerning personnel..."

Feeling aggrieved, she, together with other discharged employees, filed an action for injunction, mandamus, and damages, contending that the discharge was illegal and politically motivated.

The court timely heard the case, and on the basis of stipulated documentary evidence[1], found for defendant. We agreed to review.

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The trial court concluded that the position of Personnel Director was confidential, invoking sec. 4(a) on Exempt Service of Municipal Ordinance No. 66, 1973-74 Series, and the list of Exempt Services Positions in the Personnel Regulations of the Municipality of Cidra with regard to the functions of confidential employees, their free selection and removal. Appellant questions that ruling arguing that the ordinance did not contemplate the position as exempt and, moreover, that the

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[1] It consisted of her probationary appointment; a letter dated December 30, 1977, notifying her that the probationary period had concluded and appointing her permanently; a copy of Cidra Municipal Ordinance No. 66, 1973-74 series, approved on July 27, 1974; and a copy of the Personnel Regulations of the Municipality of Cidra adopted by Mayor Diego Reyes Vázquez on May 23, 1979, and approved by José Roberto Feijó, Director of the Central Personnel Administration Office, on June 5, 1979.

new Public Service Personnel Act, Act No. 5 of October 14, 1975, was not applicable to her case.

(1) The first error was not committed. Surely the position of Personnel Director did not appear as exempt in Ordinance No. 66, 1973-74 Series, in effect at the time of her appointment (January 1, 1978). There is no doubt, however, that the new Personnel Act, whose provisions apply ipso jure, was in force at that time. Thus, although the Personnel Regulations of the Municipality of Cidra —which classify the position of Personnel Director as confidential --was approved after her appointment, the Municipality was obliged, by express mandate of the act —secs. 10.7 and 5.7 --and as Individual Administrator should have promulgated it before, "within a period of not more than twelve months from the approval... "of the new Personnel

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Act. 3 L.P.R.A. 22 1301 and 1347. In other words, as of October 14, 1976, the Municipality should have adopted a regulation with regard to the areas essential to the merit principle in terms of recruitment, classification, etc. Insofar as it did not do so, and continued using Ordinance No. 66 as its guideline, its decisions and actions, which were contrary to and incompatible with the Personnel Act, lacked sufficient legal force to create and ratify a career position and appointment that was essentially a confidential position. We cannot --and we have so refused to in the past--endorse the theory that the inaction or illegality of the municipality

can be a source to recognize rights where there are none if they arise from a violation of the law. *Colón v. Alcalde Mun. de Ceiba*, 112 D.P.R. 740 (1982); *Delgado Rivera V. Alcalde de Carolina*, 109 D.P.R. 5, 11 (1979); *Ortíz V. Alcalde de Aguadilla*, 107 D.P.R. 819, 823, 825 (1978).

This point having been clarified, we are forced to conclude that the gap in the municipal regulations was filled by the provisions of art. 5.10 of the Personnel Act which describes the elements of a confidential position, besides listing those that de jure are of "free selection and removal." To such effects, it reads:

> Confidential Employees:
> **Confidential employees are those who intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency, such as:**
>
> 1. .....
> 2. .....
> 3. .....
> 4. .....

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> 5. Personal secretaries and drivers of **officials selected by popular election, as well as their assistants who answer directly to them.** (Underscore supplied). 3 L.P.R.A. 2 1350.

By virtue of the Municipal Law, the Mayor is the one called upon to appoint the municipal employees. Act No. 142 of July 21, 1960, as amended, arts. 35 and 91 (21 L.P.R.A. §§ 1254(1) and 1551). This function may be delegated. To such ends, appellant Franco was appointed. She functioned as the Mayor's representative, with the main responsibility of advising and answering directly to him with regard to municipal employees, in all its scope. Consequently her office was, ipso jure confidential.

> (2) The aforecited Ordinance No. 66 cannot be raised against this decision. As we have recently stated. "(t) here is nothing in the law--it would be contradictory--that allows us to hold the theory that the municipality has the absolute discretion to arbitrarily classify its employees. The determining factor is not the label or the written description, but the real nature of the functions--with regard to those duties and responsibilities as a whole, or the relation with the head of the agency." *Colón*, supra at 744-45.

In short, at the time appellant Franco was appointed, the Public Service Personnel Act was in force. The provisions of this act were applicable to her case. It should be understood that Ordinance No. 66 only governed that which was not contrary to said Personnel Act. "To fix a remedy on illegal grounds and on the noncompliance of a law is of little decisive, moral and juridical value. We can apply to the case at bar the elemental but guiding principle that '[a]) acts executed contrary to the provisions

of law are void except when the law preserves their validity.' Art. 4, Civil Code, 3 L.P.R.A. § 4. Especially when it constitutes an assault on the public order values contained in the Personnel Act. **The protection of the career position cannot be extended to he who obtained the position on the basis of standards foreign to that category.** 'Equal protection of the law does not imply equal protection to violate the law... If the [municipality] would have committed an error in the application of the law, this act would not be legal.' *Del Rey V. J.A.C.L.*, 107 D.P.R. 348, 355 (1978)." (Underscore supplied). *Colón*, supra at 746-747.

Aside from the above, the same harmonious solution would be arrived at by applying the legislative provision on the status and rights of employees at the time of effectiveness of the act.**Act No. 5 of October 14, 1975, sec. 9(1) (5). 3 L.P.R.A. § 1421(1) (5).** It provides that employees who are holding positions in the **Noncompetitive Service** shall be confidential employees if pursuant to the above-cited norms they were functioning as such. That is the case of appellant Franco.

II

(3) We have not considered the assignment concerning political discrimination. The error was committed. The existence of the constitutional right concerning political ideas was alleged and claimed. Pursuant to *Ramos v. Srio. de Comercio*, 112 D.P.R.

514 (1982), the status of confidential employee does not per se deprive a person of protection against political discrimination. It is an issue to be elucidated and examined in each particular case.

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Since the parties did not submit this question, because they lacked the benefit of that decision, we should render judgment remanding the case to the trial court where the veracity of this allegation should be elucidated pursuant to the prevailing doctrine.

Mr. Justice Díaz Cruz dissents on the grounds set forth in *Ramos V. Srio. de Comerio*, supra. Mr. Justice Rebollo López took no part in this decision.

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APPENDIX - III

IN THE SUPREME COURT OF PUERTO RICO

VICTOR COLON PEREZ	*	
APPELLANT	*	
V.	*	
MAYOR OF THE MUNICIPALITY OF CEIBA AND BOARD OF APPEALS OF THE PERSONNEL ADMINISTRATION SYSTEM	*	Nº R-81-77
APPELLEES	*	

The Mayor of the Municipality of Ceiba appointed Víctor Colón Pérez, Supervisor of Heavy Equipment, in the category of "confidential employee", effective on October 2, 1978.[2] His immediate superior was the

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[2] The Personnel Office form 11 (OP 11) shows that the Mayor signed the appointment on November 2, 1978, and that Colón Pérez took the oath of office on May 25, 1979. There is no

Director of the Municipal Public Works. He was in charge of assigning work to the machine operators, preparing reports, arranging for equipment repair and to personally operate said equipment in the absence of another operator. He was laid off on February 28, 1980. Feeling aggrieved, he appealed to the Board of Appeals of the Personnel Administration System (BAPAS), which dismissed this action under the thesis that since his appointment was of a confidential nature--it corresponded to the plan for confidential positions contained in ordinance No. 38, 1976-77 series of April

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29, 1977-- it lacked jurisdiction by virtue of our decision in *Pou Estape v. F.S.E.*, 108 D.P.R. 336 (1979). Said administrative forum further contended that Colón Pérez was fully aware of that classification and that he took office without observing the statutory requirements, that is through the process of free selection, and subject to satisfactory completion of a probationary period.

On review, the Humacao Superior Court affirmed the BAPAS' decision. The appellant appealed to this Court and we granted, the municipality a term to show cause why we should not reverse those rulings. Let us see.

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explanation for this delay.

Some, preliminary considerations are in order. First, we must clarify that there is no allegation or indicia of political partisan motivation or discrimination with regard to the municipal action. Second, the ruling in *Pou Estape*, supra, should be taken in the context of the facts therein. Pou Estape's position fell in the Exempt Service, by virtue of the Personnel Act then in force--Act No. 345 of May 12, 1947, as amended. We held that, under that state of law, the BAPAS lacked jurisdiction to entertain the matter, emphasizing that the "Board did not have jurisdiction to entertain in cases concerning the exempt service under the former Personnel Act." *Pou Estape*, supra at 341. And third, contrary to *Pou Estape*, the appointment and dismissal of appellant Colón Pérez took place under the present **Personnel Act--Act No. 5 of October 14, 1975 (3 L P.R.A. § 1301 et seq.).**

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Having clarified these points let us concentrate on the determination of the case. The record shows that the tasks assigned to appellant Colón Pérez apparently differed much from those contemplated within a confidential position. The Personnel Act in force establishes two categories of employment, Career Service and Confidential Service. With regard to the latter category, art. 5.10 contains the standards to evaluate and categorize many positions that are confi-

dential de jure[3] and of "free selection and removal". It reads:

Confidential employees:

Confidential employees are those who intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency, such as:

1. Officers appointed by the Governor, their personal secretaries and drivers; as well as their executive and administrative assistants who answer directly to them.

2. Head of agencies, their personal secretaries and drivers; as well as their executive and administrative assistants who answer directly to them.

3. Assistant heads of agencies and their personal secretaries and drivers.

4. Regional directors of agencies.

5. Personal secretaries an drivers of officials selected by popular election, as well as their assistants who

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[3] This listing is obviously instructive. The key words that go before it, "such as," are indicative of a legislative intent of conceiving those positions under the scope of **numerus apertus**.

answer directly to them.

6. Members of boards or standing committees appointed by the Governor and their respective personal secretaries.

7. Members and personnel of boards or commissions appointed by the Governor having a specific period of effectiveness.

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8. Personnel of the offices of the Puerto Rico Ex-Governors. 3 L.P.R.A. § 1350. (Underscore supplied).

Besides those positions, the law authorizes the approval of confidential positions of the following grounds:

1. Each agency shall present **for approval** of the Office a plan containing the confidential positions by which it desires to operate. **In the case of municipalities, the Municipal Assembly shall follow the ordinance or resolution approving the plan submitted by the mayor and shall send it to the Office for the sole purpose of ascertaining that the provisions of section 1350 of this title have been complied with.**

2. The Office shall only intervene to determine if the plan on confidential positions complies with the provisions of section 1350 of this title.

3. The Office may not approve more than 25 confidential positions for the same agency, except in the case of those agencies which because of their size, complexity or their organization require a greater number of confidential positions for an efficient operation.

4. Any agency interested in increasing or reducing the number of confidential positions shall submit the plan to the Office, which shall intervene only for the purposes of seeing that the criteria established by section 1350 of this title are complied with. 3 L.P.R.A. § 1351. (Underscore supplied).

[1] One can note that, contrary to agencies where the plan concerning confidential positions must be **approved** by the Central Personnel Office, the municipalities must send their plan to said office so that the latter may revise, that is, check whether or not the same complies with the two standards contemplated: (1) **functions** (intervention or substantial formulation of public policy); or (2) **relation** (rendering direct services to the head of the agency).

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There is nothing in the law--it would be contradictory--that allows us to hold the theory that the municipality has the absolute discretion to arbitrarily classify its employees. The determining factor is not the label or the written description, but the real nature of the

functions--with regard to those duties and responsibilities as a whole, or the relation with the head of the agency. Hence, it is understandable that the Central Personnel Office's intervention with municipalities in this aspect transcends the mere automatic revision. Its participation is not merely
informative but deliberative. It must also verify that the

ordinance or municipal resolution approving the confidential positions complies, in essence, with the parameters and standards fixed in the above-cited section. Otherwise the commendable aims that inspired the law would be undermined, and, furthermore, it would constitute an assault on the rational, uniform and full development of the merit system, including the municipalities.

[2] In the light of the foregoing guidelines and legal standards we find it hard to conclude that the functions of appellant Colón Pérez can validly be used to classify the positions as confidential. Everything, in practice and in the absence of a direct relation with the Mayor, tends to indicate the opposite. Consequently, in terms of the action's debatable and operational ends, we shall assume that his services corresponded to career position.

II

[3] Under this premise, Colón Pérez contends that he is entitled to the protection and benefits of a career

employee, and thus, he could not be summarily dismissed without previous preferment of charges and a hearing. On the other hand, the municipality, appellee herein, persuasively states that Colón Pérez "did not compete with other candidates for the position of supervisor of heavy equipment... Neither did he take any test for the same, nor did his name appear in the registry of eligible candidates nor did he complete any probationary period". Appellee argues that the "employee that passes by the aforementioned process, that proves his capacity during a probationary period, becomes a regular career employee, **sec. 4.3 (10), Personnel Act, 3 L.P.R.A. § 1333(10)**. These career employees are protected by the retention guarantee contained in **sec. 4.6 of the Personnel Act, 3 L.P.R.A. §1336, and sec. 9 of the By-laws for Essential Areas.** Colón Pérez knew that his position was classified as confidential. Consequently, he knew or should have known that since he was freely selected he could also be freely removed, **sec. 5.10 of the Personnel Act, 3 L.P.R.A. § 1350**"). It ends its dissertation suggesting that "said employee had no property interest by law, or regulation, or by any circumstance whatever..."

III

[4] What can be the outcome of this factual framework and legal background? After a brief examination we can see that the solution cannot rest on a claim of illegality of the classification. In the end, that is the

essence of
appellant's position. We shall reject the same. To fix a remedy on illegal grounds and the noncompliance of a

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law is of little decisive, moral and juridical value. We can apply to the case at bar the elemental but guiding principle that "[a] acts executed contrary to the provisions of law are void except when the law preserves their validity". **Art. 4, Civil Code, 31 L.P.R.A. §4**. Especially when it constitutes an assault on the public order values contained in the Personnel Act. The protection of the career position cannot be extended to he who obtained the position on the basis of standards foreign to that category. "Equal protection of the law does not imply equal protection to violate the law... If the [municipality] would have committed an error in the application of the law, this act would not be legal". *Del Rey v. J.A.C.L.*, 107 D.P.R. 348, 355 (1978).

Summarizing, even under the hypothesis that the functions carried out by appellant Colón Pérez did not correspond to those contained in a confidential classification but more so to that of a career position, it would not be cause for a judicial **imprimatur** to that effect. Being a result of an act contrary to law, such a condition is void. To attain those legal effects he cannot seek refuge on that contradictory thesis. In the light of the foregoing, although on different grounds, **judgment shall be entered affirming the judgment of the Superior Court, San Juan Part, that**

sustained BAPAS' ruling against appellant Víctor Colón Pérez.

Mr. Chief Justice Trías Monge and Mr. Justice Díaz Cruz concur with the result without an opinion.

STATEMENT OF THE CASE

Before their dismissals respondents had been working for many years with the municipality of Carolina. They all are supporters of statehood for the island of Puerto Rico and active members of the New Progressive Party **(N.P.P.)**. Petitioner José E. Aponte was elected Mayor of the municipality of Carolina in the Puerto Rico general election of 1984. He ran in the electoral ticket of the Popular Democratic Party **(P.D.P.)**, a political entity opposing statehood. Soon after taking office, **Mayor Aponte dismissed hundreds of municipal employees affiliated with the New Progressive Party and replaced them with P.D.P. members**[1]. Respondents commenced a

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[1] Mayor Aponte admitted, when questioned in Court, that he dismissed hundreds of employees. He was confronted with a list of new employees hired by his administration after dismissing hundreds of employees belonging to the New Progressive Party. As a matter of fact, during trial, evidence was admitted that Mayor Aponte, after he took office, kept hiring new employees up to the month of March 1988 for a total of 256. Mayor Aponte was called to testify by plaintiffs as a hostile witness. Excerpts from his testimony of June 15, 1988; Vol I, of the transcript, at pages 8 and 11 goes as follows:

PAGE 8

Line 21 - Q: - I gathered that you ran in the ticket of the P.D.P. party, right?

Line 22 - A: - Thats correct.

Line 24 - Q: - You have been a member of the P.D.P.

§1983 cause of action against petitioners claiming their dismissals were politically motivated in violation of their **First and Fourteenth Amendment** rights under the United States Constitution.

Following a ten - day jury trial, respondents were awarded compensatory and punitive damages. The District Court ordered reinstatement of the nine prevailing plaintiffs and enjoined the defendants from further discriminatory treatment based on political affiliation. Respondents requested judgment notwithstanding verdict which was denied and they appealed. The judgment was affirmed. Respondents filed with the Appeals Court a petition for rehearing with a suggestion for the holding of a rehearing in banc which was **carefully considered** by the judges of the Appellate Court in regular active service, which was denied.

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for how long?
Line 25 - A: - For almost my whole life.
PAGE 11
Lines 12 - 14 Q: - Mr. Mayor, I just want to find out after you took over if you dismissed some employees. That's correct, right?
Line 15 - A: - Yes.
Line 16 - Q: - And also it is a true fact that after you dismissed those employees you also, afterwards, you employed other persons, right?
Line 19 - A: - Yes, sir.

Respondents have conceded[2] on appeal that they cannot override a government employee's **First Amendment** rights but insisted on appeal that without the benefit of a **specific instruction** concerning "nullity of appointments", the Jury was unable to asses the merits of their *Mt. Healthy* claim that plaintiffs, notwithstanding their political affiliation protected conduct, would have been discharged in accordance with the **Public Service Personnel Act of the Commonwealth of Puerto Rico.**[3]

Although the District Court did not include in its jury instructions the **specific wording** requested by petitioners, nevertheless, it fully and accurately apprised the Jury on defendants **Personnel Act** claim, even spelling out defendants' contention for the Jury.

There was ample evidence presented by plaintiffs, during trial, of political discrimination and persecution against them, that moved the Jury to conclude that they would not had been dismissed, "**but for**" their

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[2] See petitioners appendix A, page A-4 1st paragraph.

[3] For text of applicable **§1333 of Title 3 L.P.R.A. of the Public Service Personnel Act of Puerto Rico**, see petitioners' Appendix G pages A 22-24 of Petition for Writ of Certiorari filed.

political affiliation[4]. Conclusions of facts were as follows: (1) defendant Aponte knew plaintiffs were affiliated with the NPP (2) vowed to rid the Carolina municipal government of NPP members (3) gave instructions to "chop off the heads of the NPP members" and (4) told municipal employees to switch to the P.D.P.

It is a fact that when petitioner Aponte took over as the new mayor after defeating the incumbent mayor of the N.P.P., there was not a chaotic situation in the administration of personnel nor pervasive and blatant illegalities in the recruitment of personnel, as petitioners allege in their STATEMENT OF THE CASE. The factual situation concerning the administration of personnel matters in the municipality was the following. **Law No. 5 of October 14, 1975 known as the PUBLIC SERVICE PERSONNEL ACT** recognize two types of personnel administrations: THE CENTRAL ADMINISTRATION AND INDIVIDUAL ADMINISTRATIONS. The Central Administration has to do with employees of the Commonwealth of Puerto Rico and individual administrations have to do with employees of the municipalities of Puerto Rico, and public corporations.

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[4] See petitioners Appendix A, page A-3 and footnote 3, at page A-5. This footnote quote the D.C. Reinstatement Order where the D.C. concluded that evidence of political discrimination presented at trial was overwhelming.

Section 1332 of Title 3 of Laws of P.R. Annotated (L.P.R.A.) which is a section of the **Public Service Personnel Act** read as follows:

> **Section 1332 (5)**: The office in the case of the Central Administration and each appointing authority in the case of Individual Administrators, shall establish separate classification plans for career and confidential services. Classes shall be grouped on the basis of an occupational or professional scheme, which shall be integrated part of the classification plan.
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> **Section 1332 (8)**: When circumstances justify it, the duties, authority and responsibilities of a position may be changed according to the criteria and mechanisms established by regulations, without necessarily requiring the reclassification of the position. In these cases, the new duties, authority and responsibilities must be related to the classification of the position affected there by.

Section 1333 which title is RECRUITMENT and SELECTION is quoted in Appendix G of petitioners, pages A-22-24.

All the above sections provide for certain degrees of flexibility to the municipalities as independent administrators like special procedures for recruitment and selection when there is no Classification Plan or even if there is one. The **Public Service Personnel Law of 1975** requires the municipalities to have a Classification Plan but reality have been stronger than the law. **Even today**, petitioner Aponte has not been

able to establish a classification plan[5] for career and confidential employees. The same happens with many other municipalities in the Commonwealth of Puerto Rico due to the lack of well trained technicians on personnel matters who will have to prepare and design such a plan. Therefore, a sui-generis system has been developed by many municipalities in Puerto Rico concerning recruiting and classifying employees where flexibility and improvisation are the guides. Respondents, as petitioners insists, cannot be penalized for being recruited trained and appointed under such system that is called chaotic by petitioner.[6]

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[5] Mr. Francisco Cappa, Expert on Personnel matters testified during trial, as plaintiff's expert witness, that as many as 3/4 of all municipalities of P.R. did not have a Classification Plan, including the Municipality of Carolina. The Classification Plan has to be submitted to OCAP for approval as is well known by petitioners. This was incontrovertible evidence at trial. OCAP stands for CENTRAL OFFICE OF PERSONNEL ADMINISTRATION OF PUERTO RICO.

[6] The Municipality of Carolina is not granting written tests to recruit and evaluate personnel, a practice during past and present administrations and only P.D.P. members are recruited. Besides, no CLASSIFICATION PLAN of the posts has been approved in contravention of **§1332 (5) of the Puerto Rico's Public Service Personnel Act.** Therefore, the Municipality of Carolina nor its Mayor are complying

The statement of petitioners in their Statement of the Case that mayor Aponte "in compliance with the provisions of valid Puerto Rico law dismissed those employees (including respondents) who had been illegally hired", is out of focus and contrary to the strong evidence presented which help the Jury to conclude that it was precisely the political discrimination animus of Mayor Aponte, the predominant factor in respondents dismissals and that respondents' termination from their employment would not had taken place **"but for"** being members of the political party backing Statehood for Puerto Rico. For instance, petitioner Aponte in footnote No.1 of his petition, states that the appointments of plaintiffs **Gladys Hiraldo Cancel, Yolanda Allende Lind and Luis Felipe Rodríguez** were made during the statutory electionary prohibition period in violation of the law. This is **incorrect**[7] because these

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with **Puerto Rico Law**, a fact contrary to what they state in their Statement of the Case, at page 8. Although the mayor testified he was complying with the law concerning recruitment and selection of personnel, plaintiffs at trial brought evidence to the contrary.

[7] Miss Gladys Hiraldo Cancel was a nurse hired, according to the municipality, on October 1, 1980; Mrs. Yolanda Allende Lind was hired on July 1, 1980; and Mr. Luis Felipe Rodríguez was hired on August 1977. All of these 3 employees were replaced by members of the Popular Democratic Party, evidence

employees had been working for some years before the election period of 1984 and their contracts were renewed periodically. It happened that when the election year came in 1984 their contracts expired during the electionary prohibition period and were automatically renewed; therefore, there was not a new **appointment** as petitioners allege, which is prohibited by **section 1337 of Title 3 (3 P.R.L.A. 1337) of the Puerto Rico LAWS ANNOTATED**, but an automatic **reappointment**, which is not prohibited by law. Besides, the Secretary of Justice of Puerto Rico in some of his opinions have recognized that an absolute prohibition will lead to "**illogical results**" because it would paralyze public activities. These opinions of the secretary were issued to answer consultations of public agencies concerning **section 1337 of title 3 of the Puerto Rico Law Annotated** and are found in commentaries to **section 1337 of title 3**, at page 136 of the CUMULATIVE POCKET SUPPLEMENT, 1986, which are reproduced here.[8]

Also, in footnote No. 1 of their petition, petitioner say that plaintiffs own expert witness "concluded that Mrs. Allende and plaintiff Fermin Marengo would have to be dismissed". This is also a wrongful statement of

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not contradicted by defendants at trial.

[8] See Appendix No. I.

petitioners as to this testimony[9]. Also in footnote No.

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[9] Respondents' expert witness was Mr. Francisco Cappa, former technician for OCAP (Central Administration Office for Personnel) who testified during the hearing of June 21, 1988. He clearly opined that Miss Lind appointment as Secretary I which was of a transitory nature and renewed every time the appointment expired, was valid. The evidence was that she went to an interview as Secretary I after a convocation for the post was published and she was recruited. She worked from July 1, 1980 to January 7, 1986 when she was dismissed for political reasons. Also, she worked for a gerontology committee which is a health area excluded from the VEDA prohibition of **§1337 of Title 3 of P.R. Laws Annotated**. There was conflicting evidence as to the Marengo's Personnel file which was incomplete. Mr. Marengo testified that he completed his required probationary period. There was evidence during trial of tampering with plaintiffs files and the disappearance of official documents from such files which were under the custody of defendants and plaintiffs were not allowed to see them, according to the evidence at trial, until after the suit was filed. At trial it came out that one out of two evaluations concerning Mr. Marengos' probationary period was missing from his personnel file but a transmittal letter from the Finance Department to the Personnel Office makes reference to the evaluations of Mr. Marengo as approving his probationary period as Municipal Treasurer. Mr. Marengo became a career employee on October 2, 1981, on a probationary basis as treasurer. Two evaluations were made regarding his performance from October to December on 1981, and from January to March on 1982, by the Finance Director Mr. José Rodríguez Vega, but the second evaluation was missing from his personnel file. It was

1, petitioners state that plaintiff Aura González "openly admitted that she did not meet the minimum requirements of her position".[10] It all amounts then, to conflicting evidence presented to the Jury in relation to defendants' claim that respondents were illegally hired.

Also, the statement by petitioners on such footnote 1 that "all the remaining plaintiffs were dismissed in part for not meeting the minimum

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to a question put to him by counsel for defendants concerning the missing evaluation about his probationary period, that Mr. Cappa said that he could be dismissed if he did not approve his probationary period. But the evidence at trial showed that Mr. Marengo approved his probationary period.

[10] This statement is incorrect because according to her testimony she started to work in 1981, and when she was recruited, she qualified according to the past requirements of the Personnel Office of the Municipality. She was appointed a career employee as Accounting Clerk in 1981 after going through the normal process of recruitment and selection according to law. The Personnel Office of the City approved other requirements for the post when petitioner Aponte took office. These new requirements were the ones that she did not meet. This new requirements were not approved by OCAP and according to plaintiffs' expert, were void because they had to be previously approved by OCAP and they were not.

requirements of their position" is incorrect.[11]

In their Statement of the Case petitioners, at page 5 of their Petition say: "Before we dwell on the procedural events of this case, we must pause briefly to explain the provisions of Puerto Rico law involved". Then they go ahead and cite some sections of **Puerto Rico Civil Service Personnel Act, P.R. Laws Annotated Title 3 sections 1301, et seq.** At such page 5, petitioners summarized the requirements any person aspiring to become a public employee must meet according to **section 1333 of the Puerto Rico Civil Service Personnel Act, (3 L.P.R.A. 1331 et**

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[11] Mayor Aponte, when he took office on January 1985 (election was on November 84), approved **new minimum requirements** for different posts and posts like Functionary I; Functionary IV; Functionary Service Coordinator; Technical Administrator IV; Executive Functionary I; Accountant III; Buying Agent III. The requirements were not approved by OCAP. Plaintiffs' expert witness testified they had only prospective effect and were not valid because they lacked OCAP approval requiered by the Law. These new requirements are the ones that Petitioner says that plaintiffs did not meet. As a matter of fact, the evidence for plaintiffs showed that each respondent met the existent minimum requirements for their positions when they were recruited by the Municipality of Carolina. Section 1333 (1) authorized the new Mayor to revised periodically the minimum requirements "to reflect the changes in the employment market and other conditions", but this changes in requirements do not apply retroactively.

seq.) and at Appendix G (A-22) reproduce the letter of **section 1333**. Petitioners should have called the attention to other parts of such section which give **flexibility to the municipalities** and even to the state government in recruiting personnel.

Section 1333 (11) reads:

> "Special procedures for recruitment and selection may be established by regulations...etc.

Section 1333 (15) reads:

> "The Director in the Case of the Central Administration and each appointing authority in the case of Individual Administrators, may authorize selective certifications when the special qualifications of the positions require it, or the applicants have expressed their preference, in writing to work in a specific town or agency".

The evidence at trial showed the following, regarding the application of the law:

(a) That the municipality of Carolina recruited plaintiffs under "special procedures for recruitment and selection".

(b) That plaintiffs qualified to the positions they aspired according to the requirements for each position available at the time respondents were recruited.

(c) That the Municipality of Carolina has not approved a classification Plan and submitted the same for the approval of OCAP.

(d) That after petitioner Aponte, the Mayor of Carolina, was sworn in on January 1985 after winning the election in 1984, he approved requirements for different posts (but not a Classification Plan) but those new requirements were not submitted to OCAP[12] for approval, according to law.

Also, respondents competed for their positions as interviews were made between different applicants and they were appointed career employees after going through the probationary period. Therefore, it is incorrect what petitioners said at page 7 of their Statement of the Case "that they were appointed to their positions without having met the minimum requirements for those positions, without competing for them, without approving a probationary period, or were appointed, during the electionary prohibition period[13] or a combination of some or all those violations".

In their Statements of the case, petitioners cited

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[12] OCAP is the Central Office of Personnel Administration of Puerto Rico.

[13] We have pointed out previously that plaintiffs Gladys Hiraldo Cancel, Yolanda Allende Lind and Luis Felipe Rodríguez were employees that had been working for years prior to petitioner Aponte becoming Mayor and that they were not appointed to their positions but **reappointed** because there was a need for the continuance of public services.

the case of *Ortiz V. Mayor of Aguadilla* (See Appendix F of petitioners writ). Such case is inapplicable to the case at bar because Ortiz was **a temporary employee** which was changed to **permanent**, a change prohibited by **3 L.P.R.A. 1337,**[14] during the VEDA period while petitioners Hiraldo, Allende and Rodríguez were not changed in their categories; they remained in the same categories.

Also, they cited the case of *Franco V. Municipality of Cidra* (113 P.R.R. 334, 1982) but they did not include the translation of the case in their Appendix.

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[14] Section 1337 reads as follows:

"For the purpose of guaranteeing the faithful application of the merit principle in public service during the period before and after elections, the authorities shall abstain from making any movement of personnel involving areas essential to the merit principle, such as appointments, promotions, demotions, transfers and changes in the category of the employees.

This prohibition shall comprise the period of two months before and two months after General Elections are held in Puerto Rico. In the case of municipalities, it shall be understood that the prohibition extends until the second Monday of January after said General Elections.

Exceptions may be made to this prohibition for urgent needs of the service, upon approval by the Director, pursuant to the standards established by the regulations."

They should have. Precisely, this case favors respondents' position because the court remanded the case to the trial Court. Franco was dismissed by the new incoming Mayor after the election of 1980 from her position as Personnel Director of the Municipality of Cidra without preferment of charges or a hearing on the grounds that Franco was a confidential employee who could be removed at will. Franco claimed her dismissal was politically motivated but the trial court did not address the issue of political discrimination when it found for defendant, the municipality of Cidra. The **Supreme Court of Puerto Rico** said at page 339:

> "We have not considered the assignments concerning political discrimination. The error was committed. The existence of the constitutional right concerning political ideas was alleged and claimed... The status of confidential employee does not per se deprive a person of protection against political discrimination. It is an issue to be elucidated and examine in each particular case".

The **Supreme Court**, because the issue of political discrimination was not decided by the trial court, different from petitioners' case which was the main issue and the Jury passed judgment on it, remanded the case to the trial court. The **Supreme Court** ordered that at such level "the veracity of the allegation of political discrimination should be

elucidated **pursuant to the prevailing doctrine**",[15] our emphasis.

In addition to the cases cited at page 7 of their petition, petitioners cited *Estrella V. Municipality of Luquillo* 113 P.R.R. 797 (1982) and *Colón V. Mayor of the Municipality of Ceiba* 112 P.R.R. 932 (1982).

The *Estrella* case is not applicable to the facts of our case because in that case, the employee, as in the case of *Ortiz V. the Mayor of the Municipality of Aguadilla*, supra, was changed in category **during** the VEDA period. The employee had been appointed as a chauffeur in 1973 but was **promoted** to heavy equipment work coordinator on January 31, 1977. The new Mayor of Luquillo, who took over after the election on November of 1976, dismissed him on April, 1977. The Change Report (is a form used by the Municipality to inform a change in the status of an employee) was not signed, authorized or notified: the Court said:

"In these circumstances, the change was not

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[15] The **Supreme Court of Puerto Rico** was referring to the case of *Mt. Healthy City School District of Education V. Doyle*, 429 U.S. 274 (1977) and *Perry V. Sinderman* 408 U.S. 593. These two cases established the doctrine that a non tenured employee has the right to be protected in his or her Constitutional rights and a claim on such grounds is not defeated because of lack of tenure.

effective", at page 800.

The *Colón* case is also not applicable because no allegation of political discrimination was made. The **Supreme Court** in the *Colón* case said:

> "Some preliminary considerations are in order. First, we must clarify that there is no allegation or indicia of political partisan motivation or discrimination with regard to the municipal action".

Colón was appointed as confidential employee by the outgoing Mayor, but dismissed by the new incoming mayor.

In sum, all of the 4 cases of the **Supreme Court of Puerto Rico** cited by petitioners at page 7 of their petition are distinguishable from the case at bar. In our case, the core of the controversy relates to political discrimination and the Jury had ample evidence to reach a reasonable conclusion that respondents were dismissed from their posts because they are pursuing, and were at the time of their termination, the torch of equality which is statehood for Puerto Rico, an island of 3.5 million second class american citizens without political rights, which was invaded by U.S. Marines in 1898 as an Act of War, which was later on legalized by the *Paris Treaty*, signed in Paris, on December 10, 1898.

During the jury trial, the evidence was conflicting trying defendants to persuade the Jury that no political discrimination was present in their decision to terminate hundreds of New Progressive Party

followers and replacing them by followers of petitioner Mayor Aponte's own political party. The big thrust of defendants against plaintiffs claim at trial was that they were dismissed for lack of funds. This argument failed when plaintiffs proved that there were enough funds. Then, defendants put emphasis on their defense that plaintiffs were illegally hired arguing and trying to prove that some were appointed during the VEDA prohibition time and others did not have the requirements. As to this defense the evidence was also conflicting because plaintiffs brought evidence that they had the requirements of the post approved by the outgoing administration which recruited them. The incoming administration headed by Mayor Aponte, approved new requirements for the posts and tried to prove that those were the requirements. These also failed when it was brought to the Jury the fact that defendants had under their custody each plaintiffs' personnel file; that plaintiffs complained that important documents were missing from the copy of their personnel files, received after the suit was filed.

At the last day of trial, the court issued its instructions to the Jury. These instructions contain all the special instructions necessary under the *Mt. Healthy* case, 429 U.S. 274 (1977). Although petitioners **knew** that they were not entitled to a precise form of language in their request for jury instructions (See *Joia C. JO-JA Service Corp.*, 817 F. 2d 908, Cert. denied 484 U.S. 1008 (1988), they

insisted from the court to issue the specific jury instructions which appear in Appendix C, page A-12 of their petition, which title is, NULLITY OF APPOINTMENTS. The District Court denied the specific jury instructions requested by petitioners, but included **the substance** of the instructions requested as follows:

> "If you find from the preponderance of the evidence that the defendant had valid reasons to terminate plaintiffs you must find for defendant unless you find from the preponderance of the evidence that defendant would not have terminated plaintiffs from their employment **"but for"** their political affiliation".[16]

But also the D.C., in its instructions to the Jury, spell out language which included defendants' alleged reason for terminating plaintiffs. For example, notice the following language of the D.C. in its instructions to the Jury:

> "As to the career employees, defendant asserts that they are career appointments that were null and void pursuant to the **Personnel Act**. The law further provides that during the provision period, the VEDA as we call it, a municipality cannot make personnel transactions, and that include among others,

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[16] See last paragraph of petitioners Appendix D, page A-15.

appointments, reappointments, demotions, transfers, and changes in employees categories. This provision extends two months prior to the general elections until the second Monday in January, following the general election. That is two months prior and two months subsequent to the general elections".[17]

Also the D.C. instructed the Jury as follows:

"In order to prevail on the claim of political discrimination, that is, on the **First Amendment** claim, plaintiffs must establish that political affiliation was a substantial or motivating factor for not renewing their contracts or appointments".[18]

And as follows:

"Hence, if you find that political affiliation was a motivating factor for dismissing plaintiff from their career position or for not renewing plaintiffs or to appoint or contract and if you find that if **it were not for plaintiffs' political affiliation they would not have been terminated from their jobs** (our emphasis) then you must find that defendant violated

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[17] See first paragraph of page A-14 of petitioners' Appendix-D.

[18] 2nd. paragraph, page A-14 petitioners Appendix A.

plaintiff's **First Amendment** right and are liable to plaintiffs for damages",[19]

And also:

"However, if you find that political affiliation was not the motivating factor for the termination of plaintiff from their career or transitory or contract jobs, then you must find that the defendant did not violate the plaintiffs **First Amendment** rights and are not liable to plaintiff for damages. In other words, if you find from the preponderance of the evidence that defendant had **valid reasons**[20] to terminate plaintiffs you must find for defendant"[21], (our emphasis) "unless you find from a preponderance of the evidence that defendant would not have terminated plaintiff from their

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[19] Last paragraph, page A-14, petitioners Appendix A.

[20] Defendant brought evidence trying to persuade the Jury that they dismissed the respondents that were career employees because they were illegally hired and not because they were members of the opposite political party. Defendant also, brought evidence trying to persuade the jury that respondents Allende Lind and Gladys Hiraldo who were transitory employees were dismissed for lack of funds and not because of partisan politics. They also tried to prove that they were appointed during the VEDA prohibition period.

[21] Page A-15, Appendix A for petitioners.

employment "**but for**" their political affiliation".

In view of the above instructions, there is no doubt that the substance of defendants' request for instructions concerning nullity of appointment was issued to the Jury, specially when the D.C. told the Jury:

> "As to career employees defendants asserts that they are career appointments that were null and void pursuant to the **Personnel Act**".

Petitioners' contention in their Statement of the Case referring to their evidence as "uncontroverted, unimpeached and overwhelming" is a hyperbole. The evidence presented from both parties **was conflicting** as we have demonstrated herein so far. Both parties presented testimonial, documentary and expert evidence during a 10 day jury trial. Was the Jury then, who as the judge of the facts, decided the conflict of the evidence.

Petitioners, also attacked the D.C. action in ordering the reinstatement of plaintiffs to their positions. The **First Circuit** on that issued said:

> "... reinstatement is an equitable remedy which is reviewed for abuse of discretion..." and added "Considerable difference is accorded a reinstatement order as the district court has first hand exposure to the litigants and the evidence ... and is in a considerable better position to bring the scales into balance than

an appellate tribunal".[22]

REASONS FOR NOT GRANTING THE PETITION

Petitioners divided in 3 parts their arguments why this **Hon. Court** should grant their petition for writ of certiorari. None of the reasons presented "are special and important" nor have the characteria needed under **Rule 10** of the Rules of the **Supreme Court**. Therefore, the petition should be denied. Let us see.

Petitioners, in reason A at page 10 of their petition state as follows:

Reason: A-

> THE DECISION ISSUED BY THE COURT OF APPEALS IS CONTRARY TO THE OPINION ISSUED IN *MT. HEALTHY CITY SCHOOL DISTRICT BOARD OF THE EDUCATION V. DOYLE* 429 U.S. 274 (1977).

Petitioners are mistaken. The crux of petitioners argument concerning Reason A is that, as they argue, the **Circuit Court** took the position that even if an appointment of a public employee is null and void, that fact may not form the basis of a defense under *Mt. Healthy V. Doyle*, supra. Nowhere, in the

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[22] Petitioners Appendix A, page A-5.

decision of the **First Circuit** (See petitioners Appendix A) you find circuit **Judge Cyr** saying that, actually is otherwise. **Hon. Judge Cyr**, writing for the Court, recognized that petitioners had the right to demonstrate by the preponderance of the evidence that plaintiffs could be terminated for legitimate reasons in any event and that it was a question of fact for the Jury to decide the issue. **Judge Cyr**, at page A-3 of petitioners Appendix wrote as follows:

> "Whether the present plaintiffs established by a preponderance of the evidence that their employment would not have been terminated absent their constitutionally protected political conduct - a question of fact, see *Doyle* 429 U.S. at 287, at 576, *Roure V. Hernández Colón*, 824 F. 2d. 139 (1st Cir. 1987) - was submitted to the Jury as follows:
>
> If you find from the preponderance of the evidence that the defendant had valid[23] reasons to terminate plaintiff, you must find for defendant unless you find from the preponderance of the evidence that defendant would not have... terminated plaintiffs employment

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[23] The valid reasons **Judge Cyr** is referring are defendants' defense that plaintiffs were terminated because the appointments of respondents who were career employees were null and the appointments of the respondents who were transitory employees, were made during the VEDA period.

"but for" their political affiliation".

Then he added:

> "The Jury instructions given by the district court correctly articulate the "**but for**" test to be used in these cases".

Besides misreading **Judge's Cyr** opinion, petitioners state incorrectly at page 13 of their petition that "Plaintiffs could not refute that their appointments were made in contravention of various provisions of the **Puerto Rico Public Service Personnel Act**". As a matter of fact, plaintiffs evidence at trial, both documentary and testimonial, rebutted defendants contention that they did not qualify for their posts.[24]

There is no dispute that Mayor Aponte, the petitioner, when he took over, issued new requirements for many posts, and that he hired hundreds of new employees affiliated to his political party after he dismissed plaintiffs.

Plaintiffs are not "a new breed of untouchable

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[24] For example, in the case of plaintiff Hiraldo Cancel, first plaintiff in caption when she applied to the post of EXECUTIVE FUNCTIONARY V, she had 4 years of college and the requirement for such post was met by her. When respondent won the election and took over, he lowered the requirement to high school diploma so that Nydia Martínez with only high school diploma could qualify and was appointed EXECUTIVE FUNCTIONARY V. Martínez is member of the political party of petitioner.

public employees" as petitioner stigmatized respondents, but parents with families to support whose grave sin in the eyes of petitioner has been to support statehood for this island of ours and who continue to support that quest for equality no matter what persecution they go through, because they believe ideals are of paramount importance in human endeavors.

Also, no "blatant illegality" in their appointments took place, as petitioners state. Respondents were appointed under existing municipal requirements and went through the recruitment process then available which consisted of an oral exam and interview[25] in competition with other applicants. Respondents are not immune from dismissal as petitioners also state. They can be dismissed for cause.

The appellate court followed the method of analysis established in *Mt. Healthy*, contrary to what petitioners claim. **The appellate court precisely recognized that the D.C. had followed the method of analysis we find in *Mt. Healthy* and that the D.C. charged the Jury with instructions following**

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[25] Still today, petitioner Aponte uses the same process and no written exams are given to applicants for public post in the municipality of Carolina. This is uncontroverted. The evidence as to the issue of whether or not plaintiffs had the qualifications for the positions they were appointed, was conflicting at some points between plaintiff and defendants. The jury decided the conflict.

the but for formulae. **Hon. Judge Laffitte**, the D.C. judge, put squarely before the Jury the arguments and evidence of defendants when he told the Jury:

> "If you find from the **preponderance** (our emphasis) of the evidence that defendant had valid reasons to terminate plaintiffs, you must find for defendant unless you find from the **preponderance** of the evidence that defendant would not have terminated plaintiff from their employment **"but for"** (our emphasis) their political affiliation"[26]

The problem with the D.C. formulae in *Mt. Healthy* was it gave 100% weight to the exercise of the **protected conduct** and no weight to other permissible grounds. With this formulae, only one side of the coin is before the trial of the facts. That is why this **Hon. Supreme Court** said in *Mt. Healthy* (supra) at 274:

> "A rule of causation which focuses **solely** on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire,[27] could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have

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[26] See last par. A-15 (jury instructions).

[27] Could be to dismiss or demote, or transfer or recall. See **Rutan V. Republican Party of Illinois**, 110 S. Ct. 2729 (1990).

occupied had he done nothing". (our emphasis)

So, the **U.S. Supreme Court** leaves us with the clear formulae that **not necessarily** the violation of the constitutional protected conduct even when it plays a substantial part in the decision against the public employee, would "**amount to a constitutional violation justifying remedial action**", ibid, at page 274. In our present case, the Jury had the two sides of the coin and decided against petitioners because in the eyes of the Jury, defendants did not prove by preponderance of the evidence, that they would have reached the same decision in dismissing plaintiffs in the absence of the protected conduct. In other words, had all respondents been members of the same political party of petitioners, would they had been dismissed? That was an issue of fact for the Jury.

In view of the above, the results of the decision rendered by the **Court of Appeals** are **not** contrary to the rationale and purposes expressed in the "**ratio decidendi**" and "**stare decisis**" of *Mt. Healthy*, supra, in adopting the rule of causation for **First Amendment** cases. Petitioners argue to the contrary at page 14 of their petition. The **First Circuit** does not misapplies the test of *Mt. Healthy* to the facts of our case. Furthermore, petitioners state **incorrectly** that "it stands uncontroverted that plaintiffs were all appointed in violation of the *Puerto Rico Personnel*

Act'.[28] We have shown previously the incorrectness of such assertion. Plaintiffs Gladys Hiraldo and Allende Lind who were transitory employees had been working long before petitioner took over the administration of the Municipality and were reappointed, not appointed during the VEDA period.

REASON B: Petitioners in reason B, at page, 15 states:

> THE DECISION REACHED BY THE COURT OF APPEALS FOR THE **FIRST CIRCUIT** IS IN

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[28] The evidence at trial was conflicting. Plaintiffs who were career employees brought evidence that they were recruited under the requirements for the post approved by the Municipality at the time they applied and under the recruitment procedure in existence. Defendants tried to prove that some of the plaintiffs did not qualify. Some of the plaintiffs that had been working and paid with federal funds under the CETA program (COMPREHENSIVE EMPLOYMENT TRAINING ACT) went through a special selection procedure (see petitioners Appendix G page A-23 par. 11) and competed for the tenure position they were dismissed from. These employees are respondents Marengo; Conde; Marquez; González and Aurea González. Municipal Ordinance No. 16 (plaintiffs' Exhibit 5 at trial) was approved to establish the special selection procedure the Personnel Act of P.R. authorizes. The City of Carolina was a sponsor for CETA program. Plaintiff expert witness, Mr. Cappa, testified this process through which these four respondents were recruited and appointed, was legal.

CONFLICT WITH THE DECISION OF OTHER UNITED STATES COURTS OF APPEALS IN MATTERS NOT YET RESOLVED BY THIS **HON. COURT.**

At the start of their arguments petitioners state that "The present case, however is unusual in that the reason adduced by defendants for the dismissal of plaintiffs was not discretionary in nature, but the dismissals were instead mandated by valid state law". This is a wrong statement and contrary to the decisions of the **Supreme Court of Puerto Rico** and to the case of *JAMES LOUDERMILL v. CLEVELAND BOARD OF EDUCATION*[29] 532 L.W. 4306 (1985) which prohibits summary dismissals of career employees because they are protected by the due process clause. The **Supreme Court of Puerto Rico** has adopted the rule found in *Mt. Healthy*. For example in *CARMEN FRANCO V. MUNICIPALITY OF*

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[29] Even in *Loudermil*, where the employee, a security guard, had committed fraud when he filed his application for employment (he had said in his application he had not committed any crime but it was found latter on that he had been convicted of grand larceny), this **Supreme Court** protected Loudermil's Constitutional rights as a public employee. Although this was not a First Amendment case, but a Fourteenth Amendment one, the trend of this Honorable Supreme Court is clear regarding the protection of the Constitutional rights of public employees.

CIDRA[30] 113 P.R.R. 334 (1982), decided after *Mt. Healthy*, the court said:

> ..."the status of confidential employee does not per se deprive a person of protection against political discrimination" at 339. Under the **Public Service Personnel Act of Puerto Rico**, supra, confidential public employees can be dismissed at will but the **Supreme Court of Puerto Rico** protects them if the motivating or substantial factor in the dismissal is for political reasons and the employee would not had been dismissed **"but for"** the protected conduct."

In the case of *VICTOR COLON PEREZ V. Mayor of the Municipality of Ceiba* 112 P.R.R. 932 (1982)[31] the **Supreme Court of P.R.** dealing with an illegal appointment at the municipal level of a heavy equipment supervisor, who was dismissed by the new incoming Mayor said, as part of its rationale for sustaining the dismissal:

> "Some preliminary consideration are in order. First, we must clarify that there is no allegation or indicia of political partisan motivation or discrimination with regard to the municipal action", at page 935.

This reasoning serves as an illustration concerning

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[30] See Appendix II for respondents. Translation of the case.

[31] See Appendix III for respondents.

the position of the **Supreme Court of P.R.** concerning political discrimination against public employees.

Petitioners say also at page 15 of their petition:

> "An extensive research on this issue yielded no cases from this **Honorable Court** and only a few decisions by the **courts of appeals**, in which such reasons were involved. However, all the **courts of appeals** which have confronted such reasons have found for defendants, except the Court of Appeals for the **First Circuit**. There is therefore a conflict among the circuits which should be resolved by this **Hon. Court**".

Petitioners cited to back up the above statements the following cases: *WINTERS V. LAVINE*, 574 F. 2d 46 (2nd. Cir. 1978); *LEDFORD V. DELANCEY*, 612 F. 2d. 883 (4th Cir. 1980); *JURGENSEN V. FAIRFAX COUNTY, VIRGINIA*, 745 F. 2d. 868 (4th Cir. 1984); *SMITH V. PRICE*, 616 F. 2d. 1371 (5th Cir. 1980); *HAMM V. MEMBERS OF BOARD OF REGENTS OF STATE OF FLORIDA*, 708 F. 2d. 647 (11th. Cir. 1983); *DARNELL V. CITY OF JASPER, ALABAMA*, 730 F. 2d. 653 (11th. Cir. 1984).

The key phrase in petitioners' statement is the following: "There is therefore a conflict among the circuits which should be resolved by this **Hon. Court**". An analysis of the cases cited above demonstrate that **there is no such conflict** since this **Hon. Court** decided the *Mt. Healthy* case. Therefore

Rule 10 (a) of the Rules of the Supreme Court, do not apply and the petition for the writ of certiorari should be denied. Let us see the different cases.

(1) *Winters V. Lavine*, supra, was decided Jan. 16, 1978, one year after *Mt. Healthy* by the Second Circuit. This case deals about the res judicata doctrine of collateral estoppel and the decision there was that "Rule of collateral estoppel and modified version of doctrine of res judicata serve to bar prosecution of civil rights action under statute authorizing civil action for deprivation of rights in federal district court after a prior state court adjudication of a similar action". The Circuit Court did not reverse the D.C. as petitioners **wrongly** state in their petition at page 11. Rather, the Circuit Court affirmed. Writing for the circuit Court, **Judge Waterman** said at page 50, "Inasmuch as we believe the district court reached the correct result, we affirm".

The Circuit Court in this case correctly applied the *Mt. Healthy* rule of causation designed by this **Hon. Court. Hon. Judge Waterman** in this case discussed the old doctrine and now *Mt. Healthy* replaced the old juridical standard. He says at page 65: "Applying the principles set forth in *Mt. Healthy* to the case before us..." etc. That is, he applied *Mt. Healthy* to Mrs. Winters claim. I see not conflict here with the **First Circuit** application of *Mt. Healthy* in our case and the 2nd Circuit application in *WINTERS V. LAVINE*, supra.

(2) *LEDFORD V. DELANCEY* was decided January 9, 1980 three years after *Mt. Healthy*. Leadford alleged he was terminated not for inadequate job performance but because of his public pronouncements concerning substandard housing in which many of his clients lived. In this case, contrary to our case where there was a trial and the Jury passed judgment on conflicting evidence concerning the meeting of the requirements for the post, Ledford did not qualify for the post of social worker trainee, a fact that was **uncontroverted.**[32] **Hon. Chief Judge HAYWORTH**, of the 4th Circuit, writing for the Court Applied correctly the *Mt. healthy* doctrine. He says:

> "With respect to the **First Amendment** claim. *Mt. Healthy City Board of Education V. Doyle* 429 U.S. 274 provides a useful reference point", at page 885.

Therefore, the 4th circuit is in accord with *Mt. Healthy* and has decided in a uniform way following the rule of causation in such a case. I see no conflict either between the 4th Circuit and the **First Circuit** in

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[32] In our case, petitioners brought evidence at trial that respondents that were career employees did not qualify as per the requirements for the post approved by the new administration, that is, Mayor Aponte (the petitioner). On he other hand, respondents brought evidence that they had the requirements for the post as approved by the old administration which recruited and appointed them.

applying *Mt. Healthy* formulae of causation.

(3) *JURGENSEN V. FAIRFAX COUNTY* was decided on October 4, 1984 by the 4th Circuit more than seven years after *Mt. Healthy*. This case deals with a police officer that was demoted for just cause but he raised the defense that his demotion was due to his protected conduct of free speech.

It was decided in this case that:

> "In order to establish a cause of action by a public employee for alleged wrongful, discharge or demotion in violation of employees **First Amendment** rights, plaintiff employee must demonstrate that the speech complained, qualified as protected speech or activity was the "motivating" or "**but for**" cause of his discharge or demotion", at page 869.[33] The Court applied squarely The rule of causation in the *Mt. Healthy* case.

Jurgensen had violated regulations that prohibited him to give information concerning an internal inspection report. He took the report without authorization from the files of the Fairfax County (Virginia) Police Department and gave it to a reporter of the Washington Post although he knew the Department had denied the report to the Post

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[33] This language is very similar to Hon. Judge Laffitte's jury instruction language. See page A-15, last paragraph of petitioners' Appendix.

reporter. He agreed voluntary to be demoted but afterwards wrote a letter to his superior requesting rescission of the voluntary demotion, request that was denied. He filed suit to recover for a violation of his free speech rights resulting in his demotion as a public employee. The D.C. decided in his favor. The **Circuit Court** reversed and said:

> "By conceding as he did (JURGENSEN) that his demotion was the result of his violation of the regulation the plaintiff **admitted** (our emphasis) that a violation of his right of free speech was not the "**but for**"[34] or motivating cause of his demotion. His action for an alleged violation of his right of free speech should have been dismissed for failure to meet the second requirement established by *Mt. Healthy* for a valid cause of action for such violation", at page 887.

Also, in this case, contrary to ours, plaintiff **admitted** a violation of the law (a regulation is also law). In our case, none of the plaintiffs admitted the violation of the requirement for the posts they applied. They rather opposed defendants' contention that they had, by bringing forward evidence contrary to their contention.

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[34] For the first time, this apparent elusive phrase was used in *GIVHAN V. WESTERN LINE CONSOL SCHOOL DIST.* 439 U.S. 410 (1979) two years after *Mt. Healthy.*

So far, we have seen that the 2nd and 4th Circuits have decided for defendants when it is **objectively uncontroverted** the fact that the **real reason** for the government decision against the employee, is not the violation of the protected conduct. This is not the situation in our case because **it was not uncontroverted** that plaintiffs did not qualify for the job. This was a conflicting issue. In the *JURGENSEN* case, the 4th Circuit applied *Mt. Healthy* as the **First Circuit** did in our case and I see no conflict in the application of the Rule of Causation.

(4) *SMITH V. PRICE*, supra, was decided by the 5th Circuit on May 16, 1980, three years after *Mt. Healthy*. Smith was dismissed from the police force for having an extramarital affair with a woman and for the violation of other prohibitions of the Police Regulation. Smith filed suit under 1983 section alleging violation of the protected conduct of right to privacy and freedom of association. The D.C. found for plaintiff and the **Court of Appeals** reversed saying:

> "We have determined however, that the question whether an adulterous relationship is protected activity under the Constitution need not be reached", at 1375, but anyway went ahead and said: "assuming without deciding that the extramarital affair in which Smith engaged is protected by the **First Amendment** right to freedom of association or the

constitutional right to privacy, we hold that officer smith's dismissal was not constitutionally improper", at 1375.

Then went ahead and revoked the D.C. judgment on the grounds that Smith do not make any colorable claim that the city is constitutionally prohibited from discharging him for other conduct that violated the Regulation like loitering while in uniform; failure to report the taking of his police gun in violation of a rule governing proper care of departmental equipment and other violations.

What happened in this case was that the **Appellate Court** applied the "clearly erroneous standard" and reversed the D.C. because the appellant had egregiously violated the Regulation of the Police Department of the city of Athens, Georgia. So, there was **just cause** for the dismissal of the police officer from his post and the **real cause** for his termination was precisely such violation. Therefore, the **Court of Appeals** decided as follows:

> "In our view, the district courts' conclusion that officer Smith would not have been discharged without regard to his involvement in an extramarital relationship does not reflect the **truth** (our emphasis) and the right of the case", at 1379.

So, we see that also in the *SMITH* case, supra, the rule of causation designed in *Mt. Healthy* was applied correctly as was applied in the other Circuits including the **First Circuit**.

(5) *HAMM V. MEMBERS OF BD. OF REGENT OF STATE OF FLA.* (11th circuit) was decided on July, 1983 and a rehearing in banc was denied. Plaintiff HAMM filed suit under **sections 1983, 85, 88 and Title VII of the 1964 Civil Rights Act**. The D.C. granted Motion To Dismiss all claims under **F.R.C.P. 12 (b) (6)** against some defendants and also dismissed the **Title VII** claim against one defendant. The claims against the remaining defendants went to trial but at the close of plaintiffs' case, judgment for defendants was entered under **F.R.C.P. 41 (b)**. Plaintiff appealed. The **Appeals Court** affirmed because "plaintiff alleged no facts showing personal wrongdoing by others", at page 650. Mrs. HAMM had alleged that because she had opposed discrimination against other employees and because her advocacy of enforcement of equal employment opportunity laws, activities protected by the **First Amendment** and **Title VII,** she was harassed, retaliated and transferred. The **Court of Appeals** affirmed because there was just cause to transfer her, independent o her protected conduct. It was found plaintiff was admonished for behavior not in accord with instructions from her supervisor like for example, releasing without being authorized reports to the campus newspaper. "Such activity is not protected by

the **First Amendment**[35] **Hon. Circuit Judge Roney** decided, at 653. He said:

> "In any event the evidence supports the finding that defendants would have transferred plaintiff regardless of her disputed activity", at page 653, and he goes on and said: "There is substantial evidence to support the finding that the plaintiff **failed to show protected activity**".[36] (our emphasis)

Therefore, I see again no conflict between the **First Circuit** application in our case of the rule of causation and the 11th circuit application in *HAMM*, supra.

(6) *DARNELL V. CITY OF JASPER* was decided on April 23, 1984, again by the 11th. Circuit. Darnell submitted a written application to the Josper Civil Service Board for employment as a city police officer. The police chief made an investigation allowed by law, and based on his recommendation the Civil Service Board reject Darnells' employment application. He was not given then the opportunity to take a Civil Service exam, the successful completion

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[35] Like in the case of *JURGENSEN V. FAIRFAX COUNTY*, supra.

[36] Contrary to our case that the D.C. determine that "the evidence on political discriminations presented at trial was overwhelming", See footnote 3 at page A-15 petitioners Appendix.

of which was necessary to placement on the eligibility roster. He sued the City of Jasper under **Title VII** and under section 1983 charging racial discrimination. The D.C. **did not dismiss** the complaint as petitioners inform this **Hon. Court** at page 18 of their petition. Rather the D.C. found that the City denied Darnell employment because of his race, but refused to order him reinstated as a police officer. The Court of Appeals reversed the D.C. on its ruling of back pay. **Hon. Judge JAMES C. HILL** writing for the court said:

> "Therefore, the district court erred by refusing to award Darnell back pay for those periods in which his earnings were less than the amount he would have earned as a Jasper police officer", at 657.

In footnote 4 at page 657 the Court said:

> "In remanding this case, we also note that Darnell must pass the civil service examination in order to qualify for any back pay award. He is not entitled to back pay under **Title VII** if he fails the test for the simple reason that failure of the exam, objectively administered, would indicate that Darnell, would not have been hired". Then the court cited *Mt. Healthy* as the base for this remanding instructions and added: "challenges to discriminatory employment decisions held subject to "**but for**" "causation test".

So, the 11th Circuit, both in *HAMM* and in *DARNELL*, applied the causation test of *Mt. Healthy* as had been also applied in the cases of *WINTERS* (2nd. Cir.); *LEDFORD* (4th Cir.); *JURGENSEN* (4th Cir.); *SMITH* (5th Cir.). So far then, the statement made by petitioners at Reason B, page 15 of their petition, is mistaken. All the circuits, including the First, after *Mt. Healthy*, have followed the **"but for"** causation test. Also, is mistaken petitioner's assertion at page 19 of their petition when they say:

> "... it is apparent that the circuits that have confronted situations similar to the one in the case at bar have adopted a radically different approach towards the *Mt. Healthy* defense, than the one adopted by the **First Circuit**".

Petitioners, again, inform incorrectly this **Hon. Court** when at page 19 they say: "Like the cases that have been described above the present case involves a situation in which the plaintiffs have been all hired in violation of valid state law".

The cases described above are *WINTERS; LEDFORD; JURGENSEN; SMITH; HAMM and DARNELL*. Only *LEDFORD V. DELANCEY*, supra, is a case concerning a public employee that did not qualify for the post. But in his case, it was **uncontroverted** that he did not had a college degree, a requisite for his post as Social Work Trainee. Contrary to the case of *LEDFORD*, respondents brought evidence that they had the requirement for the post although defendants argued

otherwise and brought to court some documents with upgraded requirements for some posts, requirements that did not apply to respondents because they were approved after petitioner was elected.

Also, it is incorrect the statement of petitioners at page 19 of their petition that "plaintiffs have all been hired in violation of valid state law". The evidence at trial showed otherwise.

Also, it is incorrect the statement of petitioners at page 19 of their petition that "Plaintiffs appointment were null and void and that defendants were bound by **Puerto Rico Law**, to terminate those appointments". Plaintiffs appointments, who are career employees, were made according to established special procedures authorized by state law. **Section 1333 (11) of Title 3 L.P.R.A.** establish as follows:

> "(11) special procedures for recruitment and selection may be established by regulations in the following cases:
>
> (a) When there is no appropriate list eligible available for certain classes of positions and the urgency of the service to be rendered justifies it"[37].

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[37] The evidence at trial showed that there were no appropriate lists of elegibles for their positions and there was urgency of their services. They all worked for the CETA program and were already trained. The

Also, is misleading the following statement of petitioners at page 19: "The Court of Appeals for the Second, Fourth, Fifth and Eleven circuits have recognized that when state laws or regulations mandate the actions of the governmental officers, that conclusively shows that those officers would have performed those actions against the involved employees even in the absence of the protected conduct. The Court of Appeals for the **First Circuit**, however, has refused to recognized the important role of state law as a basis for a *Mt. Healthy* defense in first amendment cases". We say is misleading because of all the six cases cited by petitioners only one (*LEDFORD V. DELANCE* - 4th. Cir.) deals with the issue of qualifications for the post, and as we have said before, it was **uncontroverted** the fact that he did not qualify because he did not had a college degree while in our case the issue of qualifications was a controverted issue.

Petitioners argue that the **First Circuit** has

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city would had lost monies because it was a sponsor for such Program. Mr. Francisco Cappa, expert for plaintiffs, testified that the law authorized the municipalities to use special procedures to recruit and appoint personnel.

"refused to recognize the important role of state law as basis for a *Mt. Healthy* defense in **First Amendment** cases", and cite *Santiago-Negrón V. Castro Dávila* 865 F. 2d. 431 (1st. Cir. 1989) as the genesis of what they consider a legal sin. Petitioners have misread *Santiago Negrón* as they have misread the opinion of the **First Circuit** in our case. Nowhere in *Santiago Negrón*, supra, **Hon. Judge BOWNES**, who write for the court, refuse to recognize the important role of state law as a basis for a *Mt. Healthy* defense. The Court in *Santiago-Negrón* precisely recognized the importance of state law but applying the *Mt. Healthy* rule of causation said, at page 435:

> "We do not think that a new administration can use the "nullity" of appointments doctrine as a cover for discharges, transfers and discrimination based solely on political affiliation".

What the **First Circuit** is saying in *Santiago Negrón* and in the decision of our case, is that if the **real reason** to terminate a public employee is because of his political affiliation and not because he was recruited contrary to law, the dismissal will not stand. Of course, this is a fact finding mission for the Jury as **Judge BOWNES** said in our case:

> "Whether the present plaintiffs established by a preponderance of the evidence that their employment would not have been terminated absent their constitutionally protected political

conduct - a question of fact - see *DOYLE*, 429 U.S." at 287, etc.

The position adopted in *Santiago Negron* is not a novel one for it follows the rule of causation in *Mt. Healthy* and is not in clear conflict with the position adopted by the four circuits cited by petitioners as they claim in their petition. Neither is wrong as a matter of law nor misreads **Supreme Court** precedents.[36]The statement that the **First Circuit** misreads *Mt. Healthy* or *Ghivan*, assuming petitioners refer to those two cases which address the rule of causation, is out of focus. The **First Circuit** addresses in our case precisely such rule of causation, and applied the "**but rule**" formulae. **Judge Cyr** says at page A-3 of petitioners Appendix:

> "The jury instructions given by the district Court correctly articulate the "**but for**" test to be used in these cases".

The **First Circuit** is one of the circuits with more experience handling cases of political discrimination. Puerto Rico is the poorest area within the U.S. flag with the highest unemployment rate (official figures put the rate at 17%, but unofficial figures goes up to

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[36] Although petitioners do not mention what precedents of the Supreme Court of the U.S. they are referring to, I imagine they refer to the Mount Healthy case and to the case of Ghivan V. Western Line Consol. School Dist. 439 U.S. 410 (1978) decided two years after Mt. Healthy.

25% with some towns with an unemployment rate of up to 50%). Due to this high unemployment rate, after each election when the municipal or state government change hands, thousands of public employees are thrown out from their employments. Cases after cases are filed in the U.S. District Court for the District of Puerto Rico and appealed to the **First Circuit**. Therefore, the **First Circuit** is constantly facing facts of political discrimination and applying *Mt. Healthy*. That is why precisely in *Cordero V. de Jesus Mendez* 867 F 2d. 1 (1st. Cir. 1989) **Judge Bownes** talk about the *Mt. Healthy-Ghivan* Standard, at page 6.

In view of the above, it is quite strange that petitioners inform this **Hon. Supreme Court** that the **First Circuit** in *Santiago Negron*, supra, is disregarding the rule of causation established for the first time in *Mt. Healthy* and later on reiterated in *Ghivan*. What happened in *Santiago Negron* at the D.C. level was that defendant did not oppose **on time** the jury instructions given by the D.C. Judge where defendant had asked that a proposed instruction he filed based on the "**but for**" test, was not read to the Jury. The **First Circuit** then said at page 5, in *Santiago Negron*, supra, when defendant raised that omission as an error:

> "The force of his objection is considerably weakened by defendants failure to follow the requirements of **Fed. R. Civ. P. 51**".

Petitioners request from this **Hon. Court** to issue

the writ requested "to clarify the role that state law may play in **First Amendment** cases, particularly regarding the value it has in supporting a defense raised under *Mt. Healthy*". We oppose such request because all the Circuits including the **First Circuit**, have already recognized the role of any **legitimate** reason, including state law, a defendant has in any **First Amendment** case and all the Circuits are following the rule of causation established in *Mt. Healthy*. In our case, precisely, the **First Circuit** applied the **"but for"** test to the facts of the case. It appears that petitioners have misread the opinions in *Santiago Negron* and *Hiraldo Cancel V. Aponte* 925 F. 2d. 10 (1st. Cir. 1991). The Department of Justice represented defendants in the *Santiago Negron* case and if the government felt the **First Circuit** was not applying the **"but for"** test to the facts of that case, they should have filed a petition of certiorari in that case and not in the present case because in our case it is **very clear** that the **"but for"** test was applied:

REASON C: Petitioners in Reason C, at page 22, state:

> THE COURT OF APPEALS ERRED IN SUSTAINING THE DISTRICT COURT'S REFUSAL TO INSTRUCT THE JURY ON THE PROVISIONS OF PUERTO RICO LAW REGARDING THE NULLITY OF THE APPOINTMENTS OF

PLAINTIFFS, THEREFORE DEPRIVING DEFENDANTS OF A FAIR CHANCE TO SHOW THAT THEY WOULD HAVE DISMISSED PLAINTIFFS REGARDLESS OF THEIR POLITICAL AFFILIATION.

As to this reason, we should start saying that nowhere on petitioners' Appendix E (page A-16) it appears that brother counsel Mr. Blanco opposed the instructions of the court to the Jury. He made the same mistake that defendant did in the case of *Santiago Negron*. What Appendix E shows is similar to what took place in such case. That is, that a proposed jury instruction was filed but was not read to the Jury. When this takes place is the legal duty of counsel to oppose the jury instruction before the Jury retires and to put into the record "the grounds of the objection". **Rule 51 of the F.R.C.P.** is clear as to that duty and imposes a penalty to the party guilty in not raising the objection **and** stating the legal grounds. The pertinent part of rule 51 reads as follows:

> "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the Jury retires to consider its verdict stating **distinctly** the matter objected to and the grounds of the objection" (our emphasis).

Probably Mr. Blanco had in mind to object and to state **distinctly** the grounds of the objection, but he failed to follow the rule. Nevertheless, the **First**

Circuit addressed the issue concerning such requested jury instruction and said at page A-4 of petitioners Appendix A.

> "...the district court fully and accurately apprised the Jury on defendants' Personnel Act claim, even spelling out defendant's contention for the Jury. All the district court did not do was to adopt the exact "nullity of appointment" language included in defendants' requested instructions"...

The Court goes on and says:

> "There is no requirement that the trial court instruct the Jury in the precise form and language requested". See *J0IA V. JO-JA SERVICE CORP.* 817 F.2d 908 (1st. Cir.) Cert. denied 484 U.S. 1008 (1988).

What we have said before should be enough to dispose of Reason C. But we have to add that the "Nullity Of Appointments" proposed jury instruction which appears in page A-12 of petitioners appointments, is not the law in Puerto Rico. First of all, a career employee is protected under the *Loudermil* case, supra, and he or she cannot be dismissed summarily. Second, the regulation referred to as the legal basis for the requested instruction did not apply because the relevant **Personnel Regulation** is the one of the Municipality of Carolina and not of the Municipality of Moca. Defendant should have brought to Court the **Personnel Regulation** of the Municipality of Carolina, which they

did not. Nowhere in such Regulation approved on 2/7/79 appears the word "summary dismissals". Besides, the Municipality of Carolina has not approved a Classification Plan for all the posts establishing a Recruitment and Selection method.

Third, the case of *Guerra V. Collazo* cited also for legal support of the instruction requested, protects public employees from political discrimination, following the federal case law, even when the employee is of trust like the employee was in the *Guerra V. Collazo* case.

And last, the case of *Del Rey v. JALC* is a case too remote (it deals with an illegal construction of a Motel) of the issue of public employees. And the case of *Colon v. Alcalde Municipio de Ceiba*, also protects employees from political discrimination and is included in our opposition as Appendix III.

Petitioners were requesting from the D.C. a wrong instruction which do not summarize correctly the case law of the **Supreme Court of Puerto Rico** concerning dismissals of employees because of political discrimination.

REASON D: Petitioners in **Reason D** at page 24 states as follows:

> THE DECISION REACHED BY THE COURT OF APPEALS IN THE PRESENT CASE CONSTITUTES AN UNWARRANTED INTRUSION IN THE LEGISLATIVE PROCESS OF THE

COMMONWEALTH OF PUERTO RICO, EFFECTIVELY DELETING PORTIONS OF VALID STATE LAW AND GREATLY IMPAIRING THE CHOICE MADE BY THE PUERTO RICO'S LEGISLATURE IN ESTABLISHING A MERIT SYSTEM FOR THE PUBLIC EMPLOYMENT SECTOR.

The argument to back up this reason is out of proportion. The accusation that the **First Circuit** has deleted the Merit System established by the choice of the people of Puerto Rico is hyperbolic and unjustified and unmerciful attack to the **First Circuit**. It sounds as if **United States of America** is having imperialistic designs toward Puerto Rico through its judicial branch. This **Hon. Court** has clearly established that it would not tolerate within the American Flag and the American political scenario, the spoil system. See *Elrod v. Burns*, 427 U.S. 347 (1976)[37]. The *Burns* case, is very similar to our case. In December 1970 the Sheriff of Cook County, a Republican, was replaced by Richard Elrod, a Democrat. At that time respondents, all Republicans, were employees of the Cook's County Sheriff Office.

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[37] The same situation of the spoil system has to be prevented in Puerto Rico where we have Hon. Jaime Fuster (P.D.P) as our Resident Commisioner of Puerto Rico in Washington, elected by our people according to Federal Electoral Laws.

They were non civil service employees and therefore, not covered by any statue, ordinance or regulation protecting them form arbitrary discharge. One respondent, John Burns, was Chief Deputy of the Process Division and supervised all Departments of the Sheriff's Office working on the seventh floor of the building housing that office. Subsequent to Sheriffs Elrod assumption of office, respondents were discharged from their employments solely because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders.

The **US Supreme Court** was asked in this case to "determine whether the politically motivated discharge of employees of the Cook County Sheriff Office comports with the delimitations of the **First and Fourteenth Amendment**". This Court said:

> "We are here concerned only with the Constitutionality of dismissing public employees for partisan reasons", at 353.

In our case petitioner Mayor Aponte, "told municipal employees to switch to the P.D.P.[38]

Mayor Aponte, with this request to respondents to join his own political party in order to keep their jobs, was indulging in the same unconstitutional conduct severely criticized in the case of *Elrod v. Burns*. **Hon. Justice Brennan**, writing for the Court, said of the

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[38] See opinion of **Judge Cyr** at page A-3 of Petitioners writ, last paragraph, Appendix A.

awful, illegal and disgusting practice of patronage wholesale the following:

> "The cost of the practice of patronage is the restraint it places on freedom of belief and association. In order to maintain their jobs, respondents were required to pledge their political allegiance to the Democratic Party"... "Even a pledge to alliance to another party, however ostensible, only serve to compromise the individuals' true belief"... "Conditioning public employment on participants support prevents support of competing political interests", at 356. "Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political beliefs and association constitute the core of those activities protected by the **First Amendment**. Patronage, therefore, to the extent it compels beliefs and association, is inimical to the process which under guides our system of government and is at war with the deeper traditions of democracy embodied in the **First Amendment**. Patronage practice falls squarely within the prohibition of *Keyishian and Perry*.[39]

In *Branti v. Finkel*, 445 US 507 1980) this **Hon. Court** faced the same issue as in *Burns*, supra, the

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[39] *Keishian v. Board of Regents*, 385 US 589 (1967); *Perry v. Sinderman*, 408 US 593 (1972).

issue of patronage dismissals: Democrats trying to oust from their jobs several assistant public defenders including Mr. Finkel who are Republicans, and like in our case "the Court rejected petitioners' belated attempt to justify the dismissals on none political grounds", at 510.

In *Branti*, like in our case, petitioners tried to block respondents **Constitutional** rights by citing *Mt. Healthy* and arguing that they would have been dismissed in any event due to their lack of competence as public defenders. This practice failed in *Branti* and have failed in our case.[40]

Hon. Justice Stevens writing for the Court said:

> "If the **First Amendment** protects a public employee from discharge based on what he had said, it most also protect him from discharge based in what he believes. Under this line of analysis, unless the government can demonstrate an overriding interest... requiring that a persons private beliefs conform to those of the hiring authority, his belief can not be sole basis for depriving him of continued public employment". At 516.

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[40] Both the D.C. and the Appellate Court reached the same conclusion of fact, that is, that the evidence of political discrimination was overwhelming. This Honorable Court has a settled practice of accepting factual determinations in which the D.C. and the Appellate Court have concurred. Se footnote 6 at the *Branti v. Finkel* case.

Therefore *Perry v. Sinderman, Elrod v. Burns and Branti v. Finkel* are the "jacksonian stonewall" which petitioners must overcome in order to crush respondents freedom. Rivers of blood have inundated the planet Earth because of man's quest for freedom, equality and justice. No government and no man is above the rights of others in a democratic civilized society. The everlasting light of American ideals must go on shining within the golden framework of the **First Amendment**. That is what makes this Nation strong and vibrant in the eyes of the World. For all these reasons petitioners must fail.

We believe our arguments are strong enough to move this **Hon. Court** in the right direction to deny petitioners writ for Certiorari. But we would like to add some other arguments. **Chief Justice Taft** in 1923, in the case of *Magnum v. Coty*, 262 US 159, said:

> "The jurisdiction of the **Supreme Court** to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience show that eighty per cent of those who petition for certiorari do not appreciate this necessary limitations upon our issue of the writ".[41]

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[41] See page 258 of the book **Supreme Court Practice**, Fifth Edition by Robert L. Stern and Eugene Gressman, published by the Bureau of National Affairs, Inc.

Chief Justice Hughes made a similar observation in a letter to Senator Wheeler of March 23, 1937. He said:

> "I think it is safe to say that about sixty per cent of the applications of certiorari are wholly without merit and ought never to have been made."[42]

In 1949 **Chief Justice Binson** noted as follows:

> "The **Supreme Court** is not, and never has been, primarily concerned with the correction of errors in lower courts decisions. In almost all cases within the Courts' Appellate jurisdiction, the petitioner has already received one appellate review of his case... If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the statutory responsibilities placed upon the Court. To remain effective, the **Supreme Court** must continue to decide only those cases which present questions whose resolutions would have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the **Supreme Court** will know, therefore, that you are in a sense prosecuting class

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[42] ibid page 258.

actions..." [43]

After the PDP won the elections in 1984 and the present administration took over in 1985, a trend that is dangerous to the protection of the civil rights of the American Citizens living in Puerto Rico has been established. The attack on the **First Circuit** described in the petition for certiorari is part of that trend. The approval, for example, of a recent statute by the Legislature of Puerto Rico, controlled by the PDP, where spanish is made the exclusive language of Puerto Rico, abolishing an old statute of 1902 which made both spanish and english the official languages of Puerto Rico, is also part of such trend, more than that, it is a governmental and official institutionalized discrimination. Although the polls show that the vast majority of the People of Puerto Rico opposed such statute, the same was not submitted to a Referendum before its approval.

We have seen then in Puerto Rico, and we feel is our duty to inform this **Hon. Court** as part of my obligation to represent properly respondents, that this trend is being institutionalized by the government in power. A very dangerous situation came up recently when an english speaking American citizen residing in Puerto Rico went to a state court of the Commonwealth to file a complaint because she was

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[43] ibid page 258, 259.

the aggrieved party and the local judge, in charge of the investigation, refused to process the complaint because she was not fluent in spanish. The new law making spanish the exclusive official language in Puerto Rico prevented the judge to hear the case in the english language.

CONCLUSION

The petition for certiorari should be denied because it is frivolous. Also, being a review on writ of certiorari not a matter of right but on judicial discretion, petitioners have not met the considerations of **Rule 10 of the Rules of the Supreme Court**.

Respectfully Submitted.

In San Juan, Puerto Rico, this 12th day of November, 1991.

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